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# In the Supreme Court of the United States

**OCTOBER TERM, 1988**

PEDRO DELGADO, ELIA GREGORIO, MARCELO LLANES and MARTA R. TORRES,

*Petitioners,*

vs.

JIM SMITH, in his official capacity as Secretary of State of the State of Florida, DAVID LEAHY, in his official capacity as the Supervisor of Elections of Dade County, Florida and as a representative of a defendant class of all County Supervisors of Elections in the State of Florida, FLORIDA ENGLISH CAMPAIGN, U.S. ENGLISH LEGISLATIVE TASK FORCE, INC., and U.S. ENGLISH FOUNDATION, INC.,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

1. Is a petition, whose use in accordance with state election laws results directly in a statewide election on a proposed constitutional amendment, subject to the language minority requirements of the Voting Rights Act?

2. Is a claim brought by a private plaintiff under section 203 of the Voting Rights Act required to be heard by a three-judge district court?

## PARTIES TO THE PROCEEDING BELOW

The caption of this case contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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## THE OPINIONS IN THE COURTS BELOW

The opinion sought to be reviewed is *Delgado v. Smith*, 861 F.2d 1489 (11th Cir. 1988). The opinion affirms *Delgado v. Smith*, No. 88-1880-CIV-JWK (S.D. Fla. Oct. 24, 1988).

Both opinions are reprinted in the separately bound appendix accompanying this petition. References to materials contained in the appendix will be made by the notation "(A )." The opinion of the court of appeals appears at A1, and the opinion of the district court appears at A35.

## JURISDICTION

(i) *Date and Time of Judgment Below.* The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on November 4, 1988. (A43).

(ii) *Denial of Rehearing.* The court of appeals denied rehearing on December 19, 1988. (A45).

(iii) *Statutory Basis for Jurisdiction.* This Court has jurisdiction to review the Eleventh Circuit's opinion pursuant to 28 U.S.C.A. § 1254(1) (West 1966). Petitioners believe, however, that neither the court of appeals nor the district court had jurisdiction to decide this case. That argument is set forth in a petition for writ of mandamus that petitioners have filed with this Court. If the Court agrees with petitioners' argument that neither the court of appeals nor the district court had jurisdiction, then this Court may correct the lower courts' erroneous

exercise of jurisdiction, but may not review the merits of the case. *See Bender v. Williamsport Area School District*, 475 U.S. 534, 106 S.Ct. 1326, 1331 (1986).

## STATUTES AT ISSUE

Section 4(f)(4), Voting Rights Act, 42 U.S.C.A. § 1973b(f)(4):

> Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 203(c), Voting Rights Act, 42 U.S.C.A. § 1973 aa-1a(c):

> Whenever any State or political subdivision subject to the prohibition of subsection (b) of this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or

in the case of Alaskan natives and American Indians, if the predominant language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

Section 204, Voting Rights Act, 42 U.S.C.A. § 1973 aa-2:

> Whenever the Attorney General has reason to believe that a State or political subdivision (a) has enacted or is seeking to administer any test or device as a prerequisite to voting in violation of the prohibition contained in section 1973aa of this title, or (b) undertakes to deny the right to vote in any election in violation of section 1973aa-1 or 1973aa-1a of this title, he may institute for the United States, or in the name of the United States, an action in a district court of the United States, in accordance with sections 1391 through 1393 of Title 28, for a restraining order, a preliminary or permanent injunction, or such other order as he deems appropriate. An action under this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall be to the Supreme Court.

## STATEMENT OF THE CASE

This case involves an initiative to amend the Florida constitution to declare English the state's official language. At issue is whether, in view of the language minority provisions of the Voting Rights Act of 1965, 42 U.S.C.A. §§ 1971-1973bb-1 (West 1981 and Supp. 1988) ("Voting

Rights Act" or "Act"), it was permissible to conduct this initiative (the "Official English Initiative") using a petition written only in English.

Florida citizens who desire to amend their state constitution may initiate and circulate a petition in support of a proposed amendment. If enough valid signatures are collected, and if they meet requirements of geographic distribution, the amendment may be placed on the ballot and put to Florida's electors for their consideration. Fla. Const. art. XI, § 3.

The Florida Election Code, Fla. Stat., Chapters 97-106 (1987), and the Florida Administrative Code, Fla. Admin. Code Chapter 1C-7 (1988), prescribe in detail the manner in which a petition initiative must be conducted. These provisions delineate the form that a petition must take, and require that the petition be approved by the Florida Secretary of State before it is circulated. They also specify procedures and standards for submission of signed petitions to the Secretary for certification and ballot positioning.

In accordance with these statutes and rules, the proponents of the Official English Initiative in 1984 obtained the approval of the Secretary of State to circulate a petition on the Initiative. The petition approved by the Secretary was written exclusively in English. In August, 1988, the Secretary certified that the sponsors had collected enough valid signatures for the measure to be placed on the ballot.

Of the 366,555 signatures that the Secretary certified as valid, 63,558 were obtained from electors in six Florida counties that are covered by the language minority provisions of the Voting Rights Act. In such counties, when-

ever the state provides any materials related to the electoral process, it must provide them in the language of the applicable minority group—here, Spanish.

The petitioners filed a pre-election complaint on October 11, 1988, seeking declaratory and emergency injunctive relief. The complaint alleged that two sections of the Voting Rights Act—sections 203 and 4(f)(4)—had been violated because the Official English petitions improperly had been provided only in English in the six Florida counties covered by the language minority provisions of the Act. The complaint further alleged that the Official English Initiative should not have been certified to be put on the ballot for a vote in the upcoming election because the signatures on the improper petitions should not have been counted. Without those signatures, the Initiative would not be supported by the 342,939 signatures required by state law to place the measure on the general election ballot. Simultaneously with the filing of the complaint, the petitioners moved for a preliminary injunction against any votes being cast or counted with respect to the amendment in the upcoming November election.

Because claims under section 203 of the Act are required to be heard by a three-judge district court (with a direct appeal to the Supreme Court), the petitioners applied, pursuant to 28 U.S.C.A. § 2284 (West 1978 & Supp. 1988) and section 204 of the Voting Rights Act, 42 U.S.C.A. § 1973aa-2 (West 1981), for hearing of the cause by a three-judge court. (A47, 50). The single district judge denied the application, finding that those statutes did not require a three-judge court in this instance. (A31).

The parties agreed to consolidate the adjudication of the petitioners' requests for preliminary and permanent relief. At a one-day non-jury trial, the petitioners presented proof that the failure to circulate the petitions in Spanish suppressed awareness of the Initiative in the Hispanic community and reduced the likelihood of successful opposition to the Initiative. The single district judge nevertheless, on October 24, 1988, rendered a final order denying the requested relief and dismissing the complaint on the merits. (A42; *see also* A35-41). In a memorandum decision, the district court concluded that Florida's involvement in the petition process was "ministerial" and, therefore, did not amount to "state action" that would trigger application of the Voting Rights Act. (A37-41). Accordingly, the district court did not determine whether the "Official English" petitions were "electoral materials" within the scope of the Act. (A40).

Petitioners filed a notice of appeal from the judgment to the court of appeals on October 25, 1988. On October 27, 1988, the appellate court granted the petitioners' request for expedited disposition in light of the impending election and entered an order requiring that petitioners file their brief within four days (by October 31, 1988).[1] Thereafter, on November 2, 1988, the United States Department of Justice, as amicus curiae, filed a brief in support of the petitioners' position.[2]

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1. In their brief to the court of appeals, the petitioners raised the error in the district court's denial of the application for a three-judge court. Petitioners did, however, allege that the court of appeals had jurisdiction to review the final judgment of the district court under 28 U.S.C.A. § 1291 (West 1966 & Supp. 1988) and briefed the case on the merits.

2. In its brief, the Justice Department contended that petitions are covered by the language minority provisions of the

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On November 3, 1988, a panel of the court of appeals heard argument on the appeal. The following day, the divided panel rendered its decision, affirming the judgment of the district court, with one judge dissenting. (A1). The majority, having determined that the Voting Rights Act protects "voting," concluded that the Official English Initiative petitions were "too removed from the voting booth to fall under the Act." (A8). The majority held further that Florida did not "provide" the Initiative petitions within the meaning of the Act because the state's regulation of the petition process was merely "ministerial." (A18-20). In dissent, Judge Anderson argued that the Initiative petitions are "materials . . . relating to the electoral process" and therefore, are within the scope of the Act. (A20-23). In addition, Judge Anderson found that Florida's regulation of the petition process was extensive enough to warrant the conclusion that the state "provides" the petitions. (A26). Neither the majority opinion nor the dissent addressed the jurisdictional problem created by the single district judge's decision to adjudicate a claim that could be heard only by three judges. The petitioners' suggestion for rehearing in banc was denied on December 19, 1988. (A45).

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Footnote continued—

Act. The Department reasoned that petitions are "provided" by the state and that they must be covered by the language minority provisions as materials or information "relating to the electoral process," because, like party primaries, they can "result[ ] *automatically* in a candidacy or a question being placed on the ballot." Brief for the United States As Amicus Curiae at 9 (emphasis in original). The Justice Department also argued that a single district judge lacked jurisdiction to adjudicate the petitioners' section 203 claim. *Id.* at 9-15.

## ARGUMENT

### I.

### The Court of Appeals Decided an Important Federal Question that Has Not Been, but Should Be, Decided by this Court

Many states now authorize their citizens to initiate public votes on amendments to their constitutions by gathering signatures on petitions. In recent years, this method of self-government has become increasingly popular and has led to public votes on numerous state constitutional amendments dealing with a wide array of topics.[3] "Proposition 13" in California—an amendment that imposed strict limitations on taxation of property—is perhaps the most celebrated of the initiative amendments. Other successful initiatives have led to votes on such diverse amendments as one that requires public officials to disclose their finances, and another that increases cigarette taxes. The "Official English Amendment" at issue in this case has been, and continues to be, the subject of petition drives in many states.[4]

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3. *See, e.g., In California, They're Voting on Nearly Everything*, BusinessWeek, Oct. 31, 1988, at 30 (reporting that 29 initiatives had been placed on the California ballot and that more than $100 million would be spent promoting or fighting the initiatives); *Just Say 'No' - Or 'Yes'*, Newsweek, Nov. 7, 1988, at 63 (reporting on the more than 200 referenda and initiatives on the November, 1988 ballot in 41 states); *Review and Preview*, Barron's, Nov. 7, 1988, at 5, col. 3 (reporting that "on ballots across the country are a host of constitutional amendments, referendums and initiatives concerning everything from car insurance to the rights of privacy of AIDS victims to abortion to closing nuclear power plants") (emphasis omitted).

4. *See* Guerra, *Voting Rights and the Constitution: The Disenfranchisement of Non-English Speaking Citizens*, 97 Yale

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The popularity of initiatives makes this Court's decision whether the Voting Rights Act applies to petitions to amend state constitutions of critical importance to language minorities not only in Florida, but across the country. A decision on this issue could safeguard such minorities from direct attacks such as that launched by supporters of Official English[5] and from more subtle efforts to diminish their rights through the use of the petition process.[6] It also could ensure that this country's growing language minority population can fully participate in a newly vital process through which fundamental political change is effected.

This Court has never expressly addressed the precise Voting Rights Act issue raised here,[7] but it should

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Footnote continued—

L.J. 1418, 1418 (1988); Note,*"Official English": Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 Harv. L. Rev. 1345, 1345-47 (1987).

5. One commentator has observed: "By its own account, the 'official English' movement seeks to stimulate debate on the sensitive issue of language and to promote social unity through a common tongue. In fact, however, the movement makes language the rallying point for simmering intolerance, frustration, fear, and distrust." Note, *supra* note 4, at 1362.

6. *See* Hodgkiss, *Petitioning and the Empowerment Theory of Practice*, 96 Yale L.J. 569, 574 (1987) (pointing out that the right to petition is effectively denied, and therefore oppressive, to those who have limited financial means).

7. The Court has, however, decided the issue of whether petitions to place names on election ballots are subject to the Voting Rights Act. *See Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). The decision below directly conflicts with the principles established in *Allen* and with other decisions of this Court. Petitioners believe that *Allen* and the other decisions with which the Eleventh Circuit's decision conflicts *compel* the conclusion that initiative petitions are subject to the language minority provisions of the Voting Rights Act. This reason for granting this petition is discussed in section II *infra*.

do so now.[8] The Eleventh Circuit's interpretation of the Voting Rights Act permits the willful exclusion of minority citizens from an increasingly important electoral process—a result which Congress could not have intended. The Voting Rights Act should be construed in the broad manner required by this Court. *See Allen v. State Board of Elections*, 393 U.S. 544, 566-67 (1969). The Eleventh Circuit's decision refuses to follow this mandate and permits all future initiative petitions to be drafted and circulated in a language understood only by the English-speaking electorate.

The unpalatable conclusion of the court of appeals derives from a series of errors in its application of the law relating to the Voting Rights Act. The discrepancies between the Eleventh Circuit's ruling and the decisions of this Court and other courts of appeals are pointed out below.

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8. The same issue is raised in *Montero v. Meyer*, 861 F.2d 603 (10th Cir. 1988), *petition for cert. filed*, No. 88-6376 (U.S. Jan. 19, 1989), a case in which the Tenth Circuit vacated an injunction entered by the district court against an election on a petition initiative proposal to make English the official language of the State of Colorado. The Tenth Circuit based its reversal on three conclusions: (1) that petitions relate to neither "voting" nor the "electoral process" as required by the Act; (2) that the Attorney General's interpretive guidelines are "suggestive" rather than "mandatory" and, therefore, are not entitled to the deference that the district judge accorded them; and, (3) that because the role of state officials in the petition process is "ministerial," Colorado does not "provide" the petitions for purposes of the Act.

Like the Eleventh Circuit in *Delgado*, the Tenth Circuit in *Montero* decided an important federal question that has not been, but should be, decided by this Court. Moreover, the Tenth Circuit's decision is based on reasoning that is contrary to the decisions of this Court. On January 19, 1989, the plaintiffs in *Montero* filed in this Court a petition for writ of certiorari. Petitioners urge that the Court grant both the *Montero* and *Delgado* petitions for writ of certiorari.

## II.

## The Decision of the Court of Appeals Conflicts with Applicable Decisions of this Court

In affirming the decision of the district court that initiative petitions are not subject to the language minority provisions of the Voting Rights Act, the court of appeals failed to follow the principles established in a number of seminal decisions of this Court. This is the first point of error discussed below. Further, in affirming on the merits the district court's denial of petitioners' section 203 claim, the court of appeals departed from this Court's decision in *Allen* that a three-judge court is required to hear such a claim. For these reasons, the petition for a writ of certiorari should be granted and the decision of the Eleventh Circuit should be vacated.[9]

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9. Petitioners believe that the single district judge's refusal to convene a three-judge court should have precluded the court of appeals from affirming the district court's decision because the sole remedy is a writ of mandamus from this Court directing the district court to convene a three-judge court. Accordingly, petitioners also have filed with this Court a petition for writ of mandamus to direct the district court to convene a three-judge court to hear the petitioners' claims. *See Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10, 16 (1930) (holding that a single judge's dismissal on the merits of a claim required to be heard by three judges is reviewable only by writ of mandamus). If this Court agrees that the writ of mandamus should issue, the Court should also issue a writ of certiorari. The writ of certiorari is required so that the Eleventh Circuit's decision can be vacated and this case can be remanded to the district court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (remanding to the district court case which had been appealed to the court of appeals); *cf. Bailey v. Patterson*, 369 U.S. 31 (1962) (remanding to the district court case which had been appealed to the Supreme Court). The writ of mandamus is required to ensure that petitioners receive the relief they seek. *Stratton*, 282 U.S. at 18; *cf.*

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### A. The Eleventh Circuit's Decision on the Merits of the Voting Rights Act Claims Conflicts with Decisions of this Court

In extending the protections of the Voting Rights Act to members of language minorities, Congress required that:

> Whenever any State or political subdivision subject to the prohibitions of . . . this section provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, . . . it shall provide them in the language of the applicable language minority group as well as in the English language.

Act § 4(f)(4), 42 U.S.C.A. § 1973b(f)(4) (West 1981 & Supp. 1988); *see also* Act § 203(c), 42 U.S.C.A. § 1973 aa-1a(c) (West 1981 & Supp. 1988). In analyzing whether Florida's amendment-by-initiative procedure is covered by this statute, the court of appeals correctly engaged in a two-step inquiry: first, whether petitions used to conduct such initiatives are "materials or information relating to the electoral process"; and second, whether such petitions are "provided" by the state. The majority of the Eleventh Circuit panel answered both questions in the negative. As demonstrated below, the ruling of the court of appeals conflicts directly with controlling decisions of this Court.

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Footnote continued—

*Idlewild*, 370 U.S. at 716 (finding formal action on petition for mandamus unnecessary where case remanded for expeditious action consistent with Supreme Court opinion on certiorari review of same case); *Bailey*, 369 U.S. at 34 (remanding for expeditious action consistent with Supreme Court views in decision vacating, on appeal, order convening three-judge court).

### 1. The Decision Conflicts with this Court's Holding in Allen

This Court settled the question of whether petitions are within the scope of the Voting Rights Act shortly after the Act's provisions were adopted. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), the Court squarely held that petitions that affect what appears on the ballot on election day are "voting" materials subject to the Act's requirements.

In *Allen* the Court considered, *inter alia*, whether section 5 of the Voting Rights Act[10] applies to Mississippi's petition process for placing the names of independent candidates on the general election ballot. 393 U.S. at 551, 570.[11] The Court held that state laws concerning nominating petitions are a "procedure with respect to voting" within the coverage of the Act. *Id.* at 570.

This Court's holding in *Allen* that Mississippi's nominating petitions are within the ambit of section 5 compels a conclusion that Florida's initiative petitions are subject to the language minority requirements of sections 4 and 203. *See* Dissenting Opinion of Anderson, J. (A21). On its face, the language of section 5 (covering procedures "with respect to voting") is no broader, and is arguably more narrow, than the language of sections 4 and 203 (covering "materials . . . relating to the electoral process"). Moreover, the nominating petitions at issue in *Allen* served the same purpose, at the same stage of the electoral

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10. Section 5 of the Act requires covered jurisdictions to preclear with the Attorney General any change in a "standard, practice, or procedure with respect to voting." 42 U.S.C.A. § 1973c (West 1981).

11. The Court in *Allen* reviewed a number of consolidated decisions. Its discussion of the Mississippi nominating petitions appears in its treatment of Case No. 36.

process, as did the initiative petitions in this case: both directly preceded the placement of names or issues on the ballot for the general election. No relevant distinction between the two types of petitions can be drawn. The Eleventh Circuit's ruling on the initial statutory inquiry, that petitions are not "materials relating to the electoral process," was, therefore, an improper departure from the holding of *Allen*. *See* Dissenting Opinion of Anderson, J. (A23).[12]

The decision of the court of appeals is also in direct conflict with the *Allen* Court's reading of the legislative history of the Voting Rights Act. Throughout its opinion, the majority of the Eleventh Circuit panel presumed that the Voting Rights Act applies only to the casting of ballots at the polls.[13] Such a reading of the Act was improper. In reaching its conclusion that petitions are covered by the Act, the Court in *Allen* emphasized that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.' . . . [Congress had] an intention to give the Act the broadest possible scope." 393 U.S. at 565-67 (citations omitted).[14] The legislative

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12. In its brief as amicus curiae, the United States Department of Justice contended that "a petition must certainly be considered as material or information 'relating to the electoral process' just as a party primary election is considered action relating to the electoral process" because, "[i]n each case, the action results *automatically* in a candidacy or a question being placed on the ballot." Brief for the United States As Amicus Curiae at 9 (emphasis in original); *see also id.* at 20-24.

13. For example, in its analysis of whether the petitions were provided by the state, the court of appeals noted that "[t]he state's sole concern is a fair presentation on the *ballot* in accordance with state law." (A20) (emphasis in original).

14. Indeed, the Voting Rights Act itself defines the term "vote" to "include all action necessary to make a vote effective

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history of the Act clearly reflects Congress's intent to eradicate discrimination in all phases of the electoral process. *See, e.g.*, S. Rep. No. 295, 94th Cong., 1st Sess. 26, *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 792 ("Outright exclusion and intimidation at the polls are only two of the problems [that language minority voters] face"). For this reason, another United States Court of Appeals, in adhering to this Court's decision in *Allen*, has stated in dicta that "[t]he election itself is merely the culmination of [the electoral] process . . . . The range of conduct 'relating to the electoral process' includes . . . compliance with other statutes to place a name or an issue on the ballot." *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 833 (9th Cir. 1986).[15]

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in any primary, special, or general election, including . . . action required by law prerequisite to voting. . . ." 42 U.S.C.A. § 1973l(c)(1) (West 1981). The Eleventh Circuit ignored Congress's own definition of the term.

15. The Eleventh Circuit opinion cites approvingly the district court's decision in *Zaldivar v. City of Los Angeles*, 590 F. Supp. 852 (C.D. Cal. 1984), *rev'd*, 780 F.2d 823 (9th Cir. 1986). The *Zaldivar* trial court's analysis was harshly and persuasively criticized by the Ninth Circuit, which reversed on the only issue before it: whether sanctions against the plaintiff were appropriate under Rule 11. *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 832-34 (9th Cir. 1986) ("Zaldivar II").

The Ninth Circuit's statements in *Zaldivar II*, while made in dicta, clearly reveal that the Ninth Circuit takes a view contrary to that taken by the Eleventh Circuit in the instant case and the Tenth Circuit in *Montero*, namely that initiative petitions are covered by the language minority provisions of the Act. *See Zaldivar II*, 780 F.2d at 833 & n.11. Relying on the Tenth Circuit's decision in *Montero*, 861 F.2d 603, the Eleventh Circuit reasoned that the Act applies only to issues or candidates once they have been certified for placement on the ballot, and not to those preliminary steps that are required to place an issue or candidate on the ballot. (A18). The Ninth Circuit, on the other hand, concluded that the "argument that a recall notice is only a preliminary step to voting and therefore is unaffected by the bilingual provisions of the Act is without merit. *Zaldivar II*, 780 F.2d at 833 n.11.

### 2. The Decision Failed to Accord the Attorney General's Guidelines the Deference that this Court Has Required

The Attorney General of the United States, in published guidelines for the implementation of the language minority provisions of the Voting Rights Act, has directed:

> (a) *Types of materials.* It is the obligation of the jurisdiction to decide what materials must be provided in a minority language. A jurisdiction required to provide minority language materials is only required to publish in the language of the applicable language minority group materials distributed to or provided for the use of the electorate generally. Such materials include, for example, ballots, sample ballots, informational materials, and *petitions*.

28 C.F.R. § 55.19(a) (1988) (emphasis supplied). The Attorney General's delineation of "petitions" as materials that must be provided in minority languages is entitled to considerable deference in accordance with the decisions of this Court. *See City of Pleasant Grove v. United States*, 479 U.S. 462, 468, 107 S.Ct. 794, 798 (1987); *United States v. Board of Commissioners*, 435 U.S. 110, 131-32 (1978).

Notwithstanding this guideline, and despite the submission of a brief by the United States as amicus curiae (in which the Justice Department contended that the petitions in this case were clearly covered by the Voting Rights Act), the Eleventh Circuit found that the State of Florida was not required to provide initiative petitions in Spanish. The Eleventh Circuit held that the Attorney General's guidelines, though entitled to deference, are only "suggestive," and that the "primary responsibility" for deciding what materials fall within the Act's coverage

rests with local officials, whose views are entitled to at least the same (and perhaps more) deference. (A10-11). The court of appeals therefore embraced an interpretation of the Act that it said was consistent with the one allegedly adopted by Florida election officials. (A11).[16]

This analysis is seriously flawed and represents a departure from this Court's conclusion that the Attorney General's regulations are entitled to considerable deference. The Attorney General, who is charged with enforcement of the Voting Rights Act, is far better qualified to opine on its meaning than are local officials. *See Pleasant Grove,* 479 U.S. 462; *Board of Commissioners,* 435 U.S. 110. In fact, the great deference that this Court has accorded the Attorney General's interpretation of the Act is based on the "extensive role the Attorney General played in drafting the statute and explaining its operation to Congress." *Board of Commissioners,* 435 U.S. at 131; *see also Pleasant Grove,* 479 U.S. at 468, 107 S.Ct. at 798.

The Attorney General's view was particularly deserving of deference in this case because his "interpretation mirrors the language of the statute itself and Congress has implicitly endorsed the Attorney General's inclusion of petitions as relating to the electoral process."

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16. The court of appeals incorrectly assumed that Florida state officials had made a determination (worthy of deference) that petitions are not within the Act's scope. The record is devoid of support for this assumption. In fact, the position taken by the state Attorney General below strongly suggests that, prior to the commencement of this lawsuit, state officials never even considered whether petitions should be provided in minority languages.

(A23) (Dissenting Opinion of Anderson, J.) (*citing* legislative history of the 1982 extension of the Voting Rights Act).[17] The Eleventh Circuit's elevation of the "opinion" of local officials over that of the Attorney General is poor precedent that weakens the Justice Department's ability to enforce the Voting Rights Act effectively and indeed, undermines the Act itself. The Eleventh Circuit's construction would substitute the views of local officials for a consistent interpretation of this federal legislation, and would require deference to just those local officials that Congress sought to regulate through passage of the Act.

Moreover, as the dissenting judge convincingly argued, while the Justice Department guideline requires each jurisdiction to determine what materials are covered, it "does not provide a license to evade the mandate of the language minority provisions of the Voting Rights Act." (A22 n.2). While local officials are encouraged to fashion bilingual election procedures that serve the specific needs of their jurisdictions, those officials cannot strip the Act of its meaning by choosing to ignore the

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17. In 1982, Congress extended the bilingual provisions of the Voting Rights Act, without change, after being made aware of the following interpretation accorded by the Attorney General:

> It is our understanding that nominating petitions need to be read and understood by voters who are asked to sign them. These petitions are therefore of the type of material subject to the [Act's] minority language requirement.

Letter from Drew S. Days, III, Acting Assistant Attorney General, Civil Rights Division, to Kenneth D. Webb, Registrar of Voters, Monterey County, California, quoted in full in *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House of Representatives Comm. on the Judiciary*, 97th Cong., 1st Sess., serial no. 24, part 3 (1981), at 2327.

*minimum* duties of compliance enumerated by the Attorney General in 28 C.F.R. § 55.19(a). (A22 n.2).[18]

### 3. The Decision Conflicts with this Court's Decisions in Terry and Allwright

The court of appeals also contravened the controlling decisions of this Court in its analysis of the second statutory question—whether the State of Florida "provided" the initiative petitions. In their brief to the court of appeals, the petitioners contended that the inquiry on this issue should be guided by this Court's holdings in *Terry v. Adams*, 345 U.S. 461 (1953), and *Smith v. Allwright*, 321 U.S. 649 (1944). These fifteenth amendment decisions, cited by Congress in the legislative history of the Voting Rights Act and thereby informative of the Act's intended construction, adopt a functional test for "state action" where voting rights are at stake.[19] Based

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18. The court of appeals also stated that, in order to "harmonize" the Act with the first amendment, it was necessary to limit the reach of the Voting Rights Act to matters involved in casting a vote. (A14). This concern was unfounded. As Judge Anderson pointed out in dissent, "[t]he minority language translation required by the Voting Rights Act imposes no conceivable hindrance to circulating the petitions or collecting signatures . . . . Clearly, the substance of the speech to be communicated is not affected by the Spanish translation of the proposal." (A26 n.5). Judge Anderson also correctly noted that "[t]he Voting Rights Act, as well as other federal regulation of the electoral process, has repeatedly withstood constitutional challenges to its validity." (A26 n.5) (*citing Buckley v. Valeo*, 424 U.S. 1, 143-44 (1976); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Proponents of "Official English" have no more first amendment right to circulate their Official English petitions only in English than did Texas political parties to exclude blacks from their primaries.

19. Under *Terry* and *Allwright*, state action exists, even where the activity complained of is primarily private, so long as there can be shown "State responsibility—that somewhere,

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upon its conclusion that the petition process does not involve "voting," however, the court of appeals declined to apply *Terry* and *Allwright*. In support of that finding, the majority declared that " 'the "electoral process" . . . does not commence' " until a measure is certified for the ballot. (A18) (citation omitted).

The Eleventh Circuit's rationale for its refusal to apply the state action principles established in *Terry* and *Allwright* is contrary to the teachings of those very cases. Both *Terry* and *Allwright* involved attempts by private political parties in Texas to exclude blacks from voting in the parties' primary elections. The defendants in those cases argued (much as the court of appeals in this case found) that the right to vote did not apply because the discriminatory conduct was wholly private and involved no state action. This Court disagreed, holding in each instance that the effect of private exclusion of blacks from preliminary stages of the electoral process was to abridge the right of such citizens to participate fully in subsequent, state-run elections. *Terry*, 345 U.S. at 465-70; *Allwright*, 321 U.S. at 661-66.

Since these decisions, it has been settled that the right to vote includes, and that the Voting Rights Act protects, the freedom to participate in primary elections that precede general elections. *See, e.g., Henderson v. Graddick*, 641 F. Supp. 1192 (M.D. Ala.), *appeal dismissed*, 479 U.S. 1023 (1986); *Busbee v. Smith*, 549 F.

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somehow, to some extent, there be an infusion of conduct by officials, panoplied with State power, into any scheme by which colored citizens are denied voting rights merely because they are colored." *Terry*, 345 U.S. at 473 (Frankfurter, J., concurring). The Florida initiative process clearly satisfies this test for state action.

Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983); *cf.* 42 U.S.C.A. § 1973l(c)(1) (West 1981). The contrary conclusion of the Eleventh Circuit in this case—that "the electoral process . . . does not commence," and electoral freedoms therefore do not accrue, until an issue is actually certified for the ballot—is repugnant to the teachings of *Terry* and *Allwright*[20] and cannot support the court's rejection of the "state action" principles established in those cases.[21]

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20. The finding also contradicts the statements made by the Ninth Circuit in *Zaldivar II*. *See* discussion *supra* at note 15.

21. The court of appeals stated that it had concluded that the petitions at issue were not "provided" by the state because the role of state officials in the initiative process is "ministerial." (A20). As the United States Department of Justice argued in its amicus brief in the court of appeals: "That is hardly the point. Writing instructions for registering to vote, for instance, is a ministerial task which is clearly covered by Section 4(f)(4)." Brief for the United States As Amicus Curiae at 17 n.12. The relevant inquiry instead is the extent to which state law regulates the use of petitions.

The Florida Administrative Code prescribes in detail the form that all petitions to amend the Florida Constitution must take. Fla. Admin. Code ann. r. 1C-7.009. The Administrative Code even provides a "form" petition that is recommended for use by those who wish to sponsor an amendment initiative. *Id.* r. 1C-7.009(7). And, under the Florida Election Code, before a petition proposing a constitutional amendment may be circulated, the Florida Secretary of State must approve its format. Fla. Stat. § 100.371(3) (1987).

The Election Code and accompanying regulations set forth a procedure whereby the sponsor of an initiative must submit the signed petitions to state officials who verify and certify the number of valid signatures and determine whether the constitutional formula has been met. Fla. Stat. § 100.371(4) (1987); Fla. Admin. Code ann. r. 1C-7.0091 (1988). If it has, the Secretary of State issues to the sponsor a certificate of ballot position for the proposed amendment. Fla. Stat. § 100.371(5) (1987). Finally, the Secretary of State is required to submit the text of the proposed amendment to the Attorney General

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### B. The Eleventh Circuit's Affirmance of the Single District Judge's Refusal to Convene a Three-Judge Court Conflicts with Decisions of this Court

In the complaint, the petitioners alleged that the actions of the respondents abridged both sections 203 and 4(f)(4) of the Voting Rights Act. Congress has determined that claims advanced under section 203 must be heard by a three-judge court and an appeal from such a court's judgment must be to this Court.

Section 204 of the Act provides that claims brought under section 203 "shall be heard and determined by a court of three judges . . . and any appeal shall be to the Supreme Court." 42 U.S.C.A. § 1973aa-2 (West 1981). Although section 204 provides for enforcement of section 203(c) only by the Attorney General, the legislative history of section 203(c) clearly indicates that Congress intended also to allow private parties, such as the petitioners in this case, to enforce section 203(c). In enacting section 203 and amending section 4 of the Act, Congress stated:

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of Florida, who in turn must petition the Florida Supreme Court for an advisory opinion as to whether the proposal complies with the state's "single-subject" rule for all enactments. Fla. Stat. §§ 15.21, 16.061 (1987).

The Department of Justice found it "difficult to envision a regulation which more comprehensively dictates the preparation of the form than that imposed by Florida." Brief for the United States As Amicus Curiae at 18 (footnote omitted). Agreeing with this analysis, the dissenting judge below properly concluded that Florida's extensive regulations, coupled with the requirement of approval of a petition by the Secretary of State, satisfies the Act's requirement that petitions be "provided" by the state. (A23-27).

> Title III [containing section 203] authorizes the Attorney General to bring suit against any state or political subdivision which fails or refuses to comply with its prohibitions. Of course, private persons who are injured by the failure or refusal of a state or political subdivision to comply would also have the right to bring suit.

H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975) (citing *Allen*); *see also* S. Rep. No. 295, 94th Cong., 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 806-07 & n.40 (referring to the importance of private actions and specifically actions to enforce the rights of Spanish-speaking voters). Accordingly, Congress's clear intention was to permit private enforcement actions to complement federal enforcement.[22]

This Court has held that an implied private right of action based on an express right of action for the Attorney General which must be heard by a three-judge court also must be heard by a three-judge court. *Allen*, 393 U.S. 544. At issue in *Allen* was section 5 of the Voting Rights Act which requires covered jurisdictions to preclear changes in voting procedures by obtaining from a three-judge district court in the District of Columbia a declaratory judgment that the change does not have a racially discriminatory purpose or effect. *See* 42 U.S.C.A. § 1973c (West 1981). The provision states that

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22. Six years prior to enactment of the language minority provisions in 1975, the Supreme Court held in *Allen* that Congress intended to create a private right of action to enforce section 5 of the Voting Rights Act, 42 U.S.C.A. § 1973c, despite section 5's failure expressly to authorize private enforcement. 393 U.S. at 554-57.

any action thereunder—a preclearance action—must be heard by a three-judge court. *Id.*

In *Allen*, the Court implied a private right of action to enjoin covered jurisdictions from implementing voting changes which have not been precleared and concluded that such an action should also be heard by a three-judge court. 393 U.S. at 554-63. The Court held that Congress had required three-judge court review in section 5 to provide additional protection to states whose electoral procedures were being significantly disrupted by the preclearance process. *Id.* at 562-63. The Court further held that a private suit filed to require a jurisdiction to submit a voting change for a preclearance determination sufficiently disrupted state electoral procedures to infer that Congress would have wanted such actions heard by three-judge courts. *Id.* As the Court reasoned, "[a]lthough a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains." *Id.*

As the *Allen* Court recognized, where Congress considered disruption of state activities sufficient to warrant a three-judge court for the cause of action expressly provided in the Act, a private right of action read into that enforcement mechanism by implication must be regarded as having the same requirement.[23]

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23. The legislative history of the enactment of section 203 and of its enforcement mechanism supports this conclusion. Congress viewed private enforcement of section 203 as a complement to enforcement by the Attorney General. *See* H.R. Rep. No. 196, 94th Cong., 1st Sess. 32 (1975). Either type of court action—by the Attorney General or by a private citizen—

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In affirming the decision of the single district judge, declining to convene a three-judge court and denying both the section 4(f)(4) and section 203 claims on the merits, the court of appeals in the instant case departed from the decision of this Court in *Allen*. The reasoning set forth by the Court in *Allen* in its interpretation of section 5 of the Act compels the conclusion that a private action brought under section 203 must, like an action brought by the Attorney General pursuant to that section, be heard by a three-judge court with a direct appeal to this Court.

## CONCLUSION

The Court should grant the petition for writ of certiorari. Although the constitutional amendment at issue already has been voted on and adopted, the petitioners, having diligently sought pre-election relief, are entitled to seek a post-election remedy by their petition for writ of certiorari. *See, e.g., Toney v. White*, 488 F.2d 310, 313-14 (5th Cir. 1973) (*en banc*). This Court, and the courts below, have the power to grant such relief, either by invalidating the election results on the Official English amendment or by granting prospective relief. *See, e.g., Hadnott v. Amos*, 394 U.S. 358 (1969) (ordering a new election); *Gjersten v. Board of Election Commissioners*,

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would equally disrupt normal state electoral procedures. There is thus no language, nor any logic, to support a conclusion that Congress intended an implied private right of action to enforce section 203 to circumvent the protections of a three-judge panel it required for an Attorney General action.

791 F.2d 472, 478-79 (7th Cir. 1986) (prospective relief); *Toney*, 488 F.2d at 315 (primary election set aside).

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